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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA,

Case No. 3:12-cr-659-MO

Plaintiff,

v.

**MOTION FOR ORDER DIRECTING
GOVERNMENT TO PRESERVE
FISA/FAA-OBTAINED EVIDENCE**

REAZ QADIR KHAN,

ORAL ARGUMENT REQUESTED

Defendant.

The defendant, Reaz Qadir Khan, through counsel, hereby moves for an order that the government preserve Foreign Intelligence Surveillance Act (FISA) or FISA Amendments Act (FAA) evidence collected during its investigation of Mr. Khan and any alleged co-conspirators.

FACTUAL BASIS FOR REQUEST

The defendant was indicted by a federal grand jury of conspiring to provide material support to terrorists. (CR-1.) The government has filed a notice of its intent to offer into evidence, or otherwise use or disclose in proceedings, information obtained or derived from the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §1801 *et seq.* (CR-7) and the FISA Amendments Act, 50 U.S.C. §1881a *et seq.* (CR-59) against the defendant.

This specific motion is based on subsections of FISA and the FAA that require the Attorney General, in consultation with the Director of National Intelligence, to adopt minimization procedures, including retention procedures that provide for destruction of seized information after a certain period of time. 50 U.S.C. §1801(h)(1); 50 U.S.C. §1821(4); 50 U.S.C. §1881a(e)(1). *See, e.g., In re Application of the Federal Bureau of Investigation for an Order Requiring Production Of Tangible Things*, FISC Ct. Docket Number: BR 14-01(records seized per FISA § 1861/§ 215 of USA PATRIOT Act to be destroyed after five years), NSA Report on 702 Program (Apr. 19, 2014) (NSA upstream collection of records destroyed after two years).¹

Mr. Khan will seek disclosure in Motions to Compel of FISA/FAA information beyond that which has been provided by the government in discovery to date. Because information obtained by the government in its investigation of Mr. Khan dates back to 2005, the defendant has a good faith basis for his concern that FISA/FAA rules regarding destruction of seized information could result in the loss of material evidence. Accordingly, this request for preservation of records is appropriate.

¹ The FISC opinion is available online at <http://www.uscourts.gov/uscourts/courts/fisc/br14-01-opinion-140307.pdf> (last visited Apr. 28, 2014). The NSA Report on Section 702 is available online at <http://www.lawfareblog.com/2014/04/readings-nsa-report-on-the-702-program/> (last visited Apr. 27, 2014).

United States v. Booth, 309 F.3d 566 (9th Cir. 2002) (describing prosecutor's duty to preserve material evidence); *Cooper v. Calderon*, 255 F.3d 1104, 1113 (9th Cir.2001) (same). *See also Jewel et al v. National Security Agency et al*, (N.D. Ca. Case No. 4:08-cv-04373-JSW) (CR-189) (granting restraining order to prevent government from destroying records relevant to plaintiffs' civil challenge to the constitutionality of the seizures); *In re Application of the Federal Bureau of Investigation for and Order Requiring the Production of Tangible Things*, Docket No. BR 14-01, Gov't Motion for Second Amendment to Primary Order, at 9 ("Congress did not intend FISA or the minimization procedures adopted pursuant to section 1801(h) to abrogate the rights afforded to defendants in criminal proceedings.") (citing cases regarding government's obligation to preserve evidence), *available online at* <http://www.uscourts.gov/uscourts/courts/fisc/br14-01-motion-140226.pdf> .

Therefore, Mr. Khan respectfully requests the Court order the government to preserve all information seized during its investigation of Mr. Khan or any related targets or alleged co-conspirators.

Respectfully submitted on April 28, 2014.

/s/ Amy Baggio

Amy Baggio
Of Attorneys for Defendant